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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 649

EARL ARTIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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OCTOBER TERM, 1956

No. .....

EARL ARTIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case.

Opinions Below

The Court of Appeals entered an order *without opinion* (Appendix, *infra*, pp. 29, 39) affirming the judgment entered *without opinion* by the District Court on the Jury verdict. A petition for rehearing and other relief was denied by the Court of Appeals, also *without opinion.*

The order of the Court of Appeals affirming the conviction was entered on October 30, 1956 and the order of the Court of Appeals denying the petition for rehearing was entered on November 26, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., section 1254.

Questions Presented

1. Whether the petitioner, on an appeal to the Court of Appeals from a conviction of attempted evasion of income tax by filing a false income tax return, where the prosecution was based exclusively upon the net worth method of proof, is entitled to an opinion showing that the Court of Appeals has properly followed the directions applicable to such cases laid down by the Supreme Court in *Holland v. United States*, 75 S. Ct. 127; 348 U. S. 121.

2. Whether petitioner could be convicted of attempted evasion of income taxes by proof, under the net worth method, wherein the Government admittedly failed to investigate reasonable leads to sources of nontaxable income when such leads were received from persons other than the petitioner or were otherwise known to the Government. The possible sources of nontaxable income here were:

(1) drawings from a partnership, of which defendant was a member, consisting either of capital or of income in excess of the share taxable to the petitioner;

(2) receipts of his wife from the sale of birds not shown to have been known to the petitioner but known to the Government's investigating agents;

(3) cash which was kept in a safe deposit vault in a bank and which had been counted by the Government's agents and reported in their reports for other years by such examining agents of the Government.

3. Whether petitioner could be convicted of attempted evasion of income taxes by proof under the net worth method where the trial court failed and refused to submit the petitioner's defense theories to the jury.

4. Whether petitioner could be properly convicted of attempted evasion of income taxes when the Government, basing its proof exclusively on the net worth method, admittedly disregarded information in its possession which could explain the increase in petitioner's net worth and did not negate the effect of such information on its calculations of claimed unreported income.

5. In a prosecution for attempted evasion of income taxes, must the Government prove that its calculations of asserted correct net income take into account *all* of the elements necessary to a *correct* calculation and not merely the items for which evidence was produced?

STATUTES INVOLVED

1939 Internal Revenue Code

§ 22. Gross income.

(a) **General definition.** "Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any busi-

ness carried on for gain or profit, or gains or profits and income derived from any source whatever. . . .

§ 145. (b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. . . .

§ 181. Partnership not taxable.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. 53. Stat. 69.

§ 182. Tax of partners.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

(a) As part of his gains and losses from sales or exchanges of capital assets held for more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for not more than 6 months.

(b) As part of his gains and losses from sales or exchanges of capital assets held for more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for more than 6 months.

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b). 53 Stat. 69, as amended Oct. 21, 1942, 4:30 p. m., E. W. T., c 619, title I, S 150(g) (1), 56 Stat. 845.

§ 183. Computation of partnership income.

(a) General rule. The net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual, except as provided in subsections (b), (c), and (d).

(b) Segregation of items.

(1) Capital gains and losses. There shall be segregated the gains and losses from sales or exchanges of capital assets.

(2) Ordinary net income or loss. After excluding all items of gain and loss from sales or exchanges of capital assets, there shall be computed—

(A) An ordinary net income which shall consist of the excess of the gross income over the deductions; or

(B) An ordinary net loss which shall consist of the excess of the deductions over the gross income • • •

Statement of Case

On April 12, 1955, petitioner alone was indicted on three counts in the Southern District of Ohio for wilfully attempting to evade his and his wife's income taxes for the years 1948, 1949 and 1950. (P. App. 4a)[1]. The income and

[1] References to petitioner's appendix below are preceded by the letter P.; reference to respondent's appendix below, by the letter R.

taxes both reported and paid and those asserted in the indictment were as follows:

	Reported		Asserted	
Year	*Income*	*Tax*	*Income*	*Tax*
1948	$62,263.34	$22,961.22	$99,205.79	$44,759.18
1949	54,028.93	18,046.70	98,128.38	43,696.38
1950	47,745.50	14,987.98	59,864.07	21,582.06

After a jury trial petitioner was found guilty on the counts referring to the taxable years 1949 and 1950. He was sentenced to imprisonment for five years on each count, the terms to run concurrently, and he was fined $5,000 on each count, or a total of $10,000. (P. App. 424a).

The petitioner offered no witnesses but relied on evidence submitted by the Government, cross-examination of the Government witnesses, and the failures of the Government to submit evidence to show either that it had accounted for all known sources of receipts or that it had negated the possibility that the alleged "deficiency" in reported income was from known non-income sources.

The relevant evidence as to the years 1949 and 1950 is summarized as follows:

During the years involved, the petitioner, together with one Leland Rice, as an equal partner, conducted a numbers business. (P. App. 32a, Exhibit 98.)

The numbers business is a gambling enterprise (illegal only under the state law) wherein a bettor places a bet with a writer that a particular number will show up on the determinative calculation, (as for instance, the last three numbers in the number of shares traded that day on the New York Stock Exchange) which number is entered in a book on a slip having two counterparts showing the amount

and number bet. The bettor receives one counterpart, and the other remains in the book. The writer, in due course, turns over his betting books to a pickup man who, in turn, turns in all of the books he has collected to a house which assumes the risk. (P. App. 117a-155a).

When the pickup man delivers his books and cash to the numbers house, the cash goes to the cashier and the books go to a table for processing. First, the total bets, in all books turned in by a pickup man, are added on a machine. The percentage retained by the writer and pickup man are then computed and subtracted. The remainder is known as the "net low". After the books are so first processed, they are returned to the person in charge of the table where they are held until the winning number has been ascertained. Then the books are redistributed and the counterparts of the winning bets are separated. The books with the separated winning slips are returned and again redistributed for checking, and a "hit" slip is made by detailing the winning numbers and the books from which they were extracted. The total winnings on bets are known as "hits". (P. App. 160a-176a).

The pickup man receives back the "hit" slip and a statement showing amounts owed to or from the house for the previous day's play, adjustment for any payments, the net low for the day, the hits, and the balance of his account with the house. (P. App. 172a, 174a). This constitutes a complete daily accounting between the petitioner and each of his customers. The Government produced no evidence that these daily accountings were incorrect nor did the Government produce any evidence that the partnership books differed from these daily accountings.

During the period here involved the partnership did business with some seventy or eighty persons or with other

houses (P. App. 32a, 355a) and had some fifteen or twenty employees. (P. App. 356a).

The prosecution produced as witnesses, or accounted for, only seven persons doing business with defendant's house (P. App. 117a, 126a, 132a, 137a, 146a, 149a) and only two of defendant's employees. (P. App. 158a, 160a).

The Government offered into evidence its tax file concerning the petitioner for the year 1947. Included in that file is a copy of a report of an examination of the defendant's 1947 income tax return made by Examining Officer P. G. Kreiling, dated August 23, 1949 (P. App. 405a-409a), which contains the following statements:

> "On 8/19/49 taxpayer was requested to make available to this examiner the contents of the box * * * He has two boxes at Xenia National Bank, both of which were used for business funds. At the time of inspection one box contained $21,950.00 in cash. The other box contained $8,500.00 in cash and * * *" (P. App. 407a)
>
> and
>
> "Upon request taxpayer prepared a net worth statement as of 12/31/48, which compared favorably with net worth as of 12/31/45 (previously prepared as result of audit by another examiner for the year 1945) * * *" (P. App. 407a).

The Government offered neither of those net worth statements in evidence nor did it otherwise account for their absence. The record does not show that the Government made any use of or gave any consideration to this cash on hand in its computations of the asserted deficiency.

Also included in that file (Exhibit 4) is a letter dated April 27, 1949 and signed by Max C. Weaver, Special Agent, (P. App. 409a-410a) which contains the following statement:

"Artis is a number's o
this area. About ten ye
a joint investigation (
pated. No fraud pena
some tax was asserted.
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siderable income."

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has been examined from
e Agents and reports con-

The record does not show th
effect to any information o
inations.

the Government gave any
ined in these prior exam-

Objection was sustained t
examine the agent concernin
ords of defendant's partners
by the agents themselves) (P
ficiencies in income *against o*
also precluded from pursuing
connection with *other* taxpay
such records as *correct* reflec
ness. (P. App. 89a, 90a).
(P. App. 136a) and Singer
that these same agents prop
them based on the *correctnes*

an attempt by defense to
the agent's use of the rec-
(*asserted to be unreliable*
App. 33a) to establish de-
er taxpayers. Defense was
ny attempt to show that, in
s' returns, the agents used
ns of the defendant's busi-
vernment witnesses Kemp
. App. 132) both testified
d additional taxes against
of defendant's records.

Intelligence Conferee Ver
defendant informed him that
the statement submitted by
personal cash and not his bus
was a business bank roll. *T*
Government made any furth
(P. App. 176a-183a.)

n A. Conrad testified that
he cash on hand, shown on
e defendant, included only
ess bank roll and that there
ere is no showing that the
investigation of this item.

Testimony of Special Agen
mitted at length as to variou
bilities, but *no testimony was*
accounts or drawings. He a
did not attempt to trace the
business. (P. App. 353a-355a.

Charles R. Patton was sub-
partnership assets and lia-
iven as to partners' capital
irmatively testified that he
ash flow of the partnership

Mr. Patton testified that he had acquired information of sale of birds by the defendant's wife from other agents and that he was informed she was conducting a bird business, but he investigated only the expenses in relation thereto. Not only did the Government *not* investigate these sales as possible sources of income to defendant's wife, but it charged the defendant with the expenditures of his wife in connection with these birds when computing his change in net worth. (P. App. 351a-352a.)

The Government agents had possession of the report showing cash in petitioner's safe deposit box as counted by another agent; in a subsequent year they counted the cash also; and they had previous net worth statements received by the Government from the taxpayer. None of this information was accounted for in their computations or in the evidence or in the calculations on which petitioner was convicted. (P. App. 353a-355a.)

The record contains testimony of numerous documents which evidences so much of the assets and liabilities of the partnership as are taken into account on Government's Exhibit 111 as items 23, 24, 26, 27, 28 and 29. (P. App. 417a-419a.) All of this evidence was received over defense objections that the only proper item to be included on any net worth computation of a partner is the adjusted capital account and not his aliquot interest in the several partnership assets, which latter interest is one which remains constant regardless of his drawings from the partnership. *The Government admitted that it had no capital account adjustment to offer in evidence.* (P. App. 228a-234a.)

The petitioner requested the trial court to charge the jury:

(1) that nontaxable receipts include "advances of capital including excessive drawings from any partnership" (P. App. 371a),

(2) that the petitioner could not be convicted if the unexplained increase in net worth was from his wife's unreported income without his knowledge (P. App. 370a), and

(3) that the petitioner could not be convicted if he did all that any reasonably prudent business man could be expected to do through the use of accountants and bookkeepers to file a correct return. (P. App. 371a.)

The Court refused to submit any of these three defense theories to the jury in spite of the evidence relating thereto, as follows:

(1) There were earnings available from the partnership sufficient to have supplied the increase in net worth *without tax* which is demonstrated as follows:

	1949	*1950*
Partnership profits reported	108,900.	86,950.
Portion reinvested by firm	3,120.	(914.)
Cash available	105,780.	87,854.
Increase in net worth—		
Claimed by the Government	97,931.	54,928.
Cash remaining	7,858.	32,935.

(Exhibit 111, P. App. 417a-419a; R. App. 6b-15b.)

In other words, the Government showed that the petitioner reported his share of the partnership profits per books and returns, and asserts that the amount by which his net worth increased in excess thereof must have been from unreported profits *without any attempt to exclude nontaxable drawings* in excess of petitioner's properly re-

ported and taxed share of su
fendant's innocence and not n
ure to prove his guilt.

(2) There is no evide
tioner's wife from the separa
evidence that petitioner knew
ings, nor is there evidence
handled any of such earnings
of any attempt to show the
wife received from the peti
tures made by her represent
serted income shown by the

(3) There is evidence
a man who was both a grad
to set up his bookkeeping,
partnership; that he suppli
by that man; that he neve
what to do or what not to
work in the preparation of
professional judgment. The
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the money. *There is no evi*
received any of the cash r
handled by the cashiers an
dence that he did not instru
alter or in any way do any
gard to the business record
the petitioner himself did
with regard to the records.

The Government did not
bookkeepers or any of the ca

2

uch profits. This proves de-
nerely the Government's fail-

nce of the earnings of peti-
ate bird business, nor is there
of the amount of such earn-
that petitioner received or
. *The record is equally silent*
amount of money which his
tioner, although the expendi-
the largest portion of the as-
net worth calculation.

that the petitioner employed
uate accountant and a lawyer
both for himself and for his
ed all information requested
r instructed that man either
do, but left the scope of the
he tax returns to that man's
petitioner's business also util-
rs to handle the records and
dence that the petitioner ever
eceipts before they had been
bookkeepers. There is evi-
ct the bookkeepers to change,
hing out of the routine in re-
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nything wrong or erroneous
(P. App. 163a-173a; 91a-97a.)
roduce as witnesses all of the
shiers.

REASONS FOR GRANTING THE WRIT

I.

The Importance of this case in the General Administration of the Criminal Law.

A. The failure of the Court of Appeals to write an opinion violates the instructions of the Supreme Court.

In *Holland v. U. S.*, 75 S. Ct. 127, 348 U. S. 121, the Supreme Court pointed out:

> "* * * We concluded that the method involved something more than the ordinary use of circumstantial evidence in the usual criminal case * * *" (75 S. Ct. at 130, 348 U. S. at 124,)

and,

> "* * * Nevertheless, careful study indicates that it is so fraught with danger for the innocent that the courts must closely scrutinize its use . . ." (75 S. Ct. at 130, 348 U. S. at 125,)

therefore:

> "* * * Appellate Courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." (75 S. Ct. at 132, 348 U. S. at 129.)

It, of course, has become fashionable to ask the Supreme Court to grant certiorari on the basis of conflict with the *Holland* opinion.

Here, the Court of Appeals has found *insurance against conflict* of opinion. It just refuses to write one. By so doing, it flaunts the Supreme Court's directions in reviewing this case.

The lack of opinion in this case can be contrasted with the detailed opinions in the following analogous cases:

U. S. v. Ford, 237 Fed. (2d) 57 (17 pages);
U. S. v. Nunan, 236 Fed. (2d) 576 (16 pages);
U. S. v. Costello, 221 Fed. (2d) 668 (11 pages);
Beard v. U. S., 222 Fed. (2d) 84 (11 pages);
U. S. v. Lindstrom, 122 F. Supp. 518, aff'd. in part, 222 Fed. (2d) 761 (9 pages);
U. S. v. O'Conner, 237 Fed. (2d) 466 (9 pages).

In these cases, where evidence of guilt must rest on assumptions and approximations, and in this case where a Negro who is involved in a business which is considered to violate state laws, is accused, only a thorough explanation of its reasons by an Appellate Court can prevent a general feeling that justice has been dispensed with, not dispensed.

Where a crime under state law is collaterally involved, it is most important that the federal court show that the national government is not washing the state's dirty linen and thereby infringing on the right of the state not to enforce its own laws.

If this conviction is allowed to remain unchallenged in spite of its basis in pure assumption and inference, contrary to the injunctions of *Holland* (*Supra*), it would not be absurd to ask a jury to infer criminal intent in a tax fraud case because the taxpayer habitually violates the statute forbidding smoking in public street cars.

B. The result herein is in conflict with decisions in other circuits.

The Government, both in its brief to the Circuit and on oral argument there, admitted that it had disregarded and failed to investigate possible nontaxable sources of receipts or sources of income not chargeable to the taxpayer, in three regards:

(1) drawings from his partnership,

(2) his wife's receipts from the sale of birds, and

(3) cash disclosed in revenue agents' reports.

This disregard for *known* sources and the failure to investigate them is "justified" by the Government solely on the basis that the "leads" to these sources and the Government's knowledge of same were acquired independently of information furnished by or elicited from the accused.

By failing either to discuss this position or to rule on the legality of same, the Circuit Court tacitly, but necessarily, construed the opinion in *Holland v. United States*, (*Supra*), to mean that if the *defendant himself* does not furnish the explanations, the Government may disregard them entirely.

It is submitted that the Supreme Court's discussion of "leads" in the *Holland* case was restricted to those "leads" furnished by the taxpayer solely because the facts of that particular case show a complete investigation of all information available to the Government from other sources and an asserted lack of investigation only of the taxpayer's claims.

It is further submitted as being obvious from language throughout the *Holland* opinion that the Supreme Court could never have intended to leave to the Government in its use of the net worth method the loophole and the encroachment upon the gravamen of the *Holland* opinion which the Government has availed itself of here:

> "• • • Unlike civil actions for the recovery of deficiencies, where the determinations of the Commissioner have *prima facie* validity, the prosecution must always prove the criminal charge beyond a reasonable doubt." (75 S. Ct. at 130, 348 U. S. at 126.)

"* * * There is great danger that the jury may assume that once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows." (75 S. Ct. at 131, 348 U. S. at 127.)

"* * * But when the Government uses the net worth method, and the books and records of the taxpayer appear correct on their face, an inference of willfulness from net worth increases alone might be unjustified, especially where the circumstances surrounding the deficiency are as consistent with innocent mistake as with willful violation." (75 S. Ct. at 132, 348 U. S. at 128.)

"While we cannot say that these pitfalls inherent in the net worth method foreclose its use, they do require the exercise of great care and restraint." (75 S. Ct. at 132, 348 U. S. at 129.)

The Circuit Court, by sustaining the Government's deliberate omission to investigate *known* sources of nontaxable income in the face of the burden which the Government has to *affirmatively preclude* such sources, has established a precedent for disregarding the safeguards erected by the *Holland* decision against reckless uses of the net worth method.

The Circuit Court is sustaining, in effect, the Government's right to disregard information in its possession which is explanatory of defendant's receipts without negating such explanations. By so doing, the Court's decision is in conflict with the following cases:

Yaw v. United States (1955, C. A. 9th), 228 Fed. (2d) 382, wherein it was held that witnesses and evidence, available to the Government but not produced or accounted for at trial, must be presumed to contradict the Government's assertions.

United States v. Adonis (1955, C. A. 3rd), 221 Fed. (2d) 717, wherein it was held that by negating the explanations

received from third persons, the Government was negating the explanation of the defendant.

Marcella v. Commissioner (1955, C. A. 8th), 222 Fed. (2d) 878 at 885:

> "Since neither the Commissioner nor the Tax Court gave consideration to sources of non-taxable cash available to the taxpayer from his substantial business interests, the deficiency determination made by the Tax Court is clearly erroneous in that it was induced by an erroneous view of the law and is not supported by substantial evidence."

Dupree v. United States (1955, C. A. 5th), 218 Fed. (2d) 781 at 784:

> "The Government has still a further burden in this type of case. It is elementary that there are sources of funds that make their receipt non-taxable to the recipient. The Government, in proving its *prima facie* case must therefore exclude such sources of available funds by affirmative evidence."

Justice requires that the conflicts thus created, and detoured by the lack of an opinion below, should be discussed and explored before a defendant is required to spend his declining years in federal detention.

C. The Liberty and Property of Every Taxpaying Member of a Partnership in This Country is Jeopardized.

The Commissioner of Internal Revenue in his Annual Report for the fiscal year ending June 30, 1955, published by the Government Printing Office, stated (Page 7, thereof) that 983,000 partnership income tax returns were filed for 1954 and 1,036,000 partnership income tax returns were filed for 1955.

As pointed out in the statement of the case, the petitioner was a member of a partnership.

As early as 1928, in *Blodgett v. Silverman,* 48 S. Ct. 410 at 414, 277 U. S. 1 at 11, the Supreme Court pointed out:

> "It is very plain, therefore, that the interest of the decedent * * * was simply a right to share in what would remain of the partnership assets after its liabilities were satisfied. It was merely an interest in the surplus, a chose in action. It is an intangible, and carries with it a right to an accounting."

In *Stilgenbaur v. United States* (1940, C. A. 9th), 115 Fed. (2d) 283 at 287, it was said:

> "A co-ownership in real and personal property which is saleable and sold, is a capital asset * * *."

In *Commissioner v. Shapiro* (1942, C. A. 6th), 125 Fed. (2d) 532 at 535, the Court pointed out:

> "* * * It is a well-settled rule of law that the joint effects of a partnership belong to the firm and not the partners and that a partner has no individual property in any specific assets of the firm, instead the interest of each partner in the partnership property is his share in the surplus, after the partnership debts are paid and after the partnership accounts are settled."

In *Williams v. McGowan* (1945 C. A. 2d), 152 Fed. (2d) 570 at 571:

> "It has been held that a partner's interest in a going firm is for tax purposes to be regarded as a 'capital asset'."

In *Commissioner v. Smith* (1949, C. A. 5th), 173 Fed. (2d) 470 at 470, it was held:

> "A partner's only interest in the property of the firm is in a proper proportion of the surplus of the whole after payment of debts, including the amounts due the other partners * * *."

In *Imburgia v. Commissioner* (1954), 22 T. C. 1002, the Tax Court of the United States was faced with this very problem in a civil fraud case. There, the Court held that a proper net worth computation must include as an asset

the individual partner's interest in his capital account unaffected by overdraft and must include as a liability any excess of his drawings over his share of the partnership earnings.

In this case the Court of Appeals has approved of the use of an aliquot interest in assets and liabilities acquired by the partnership in computing the partners' net worth in complete disregard of these cases.

This problem has three different aspects, namely:

(1) Can you have a proper calculation of the individual net worth of a partner without a calculation of the net worth of the partnership of which he is a member?

(2) With all of the assumptions inherent in the net worth method itself, can you also have an assumption that a member of a partnership draws annually his full share of the earnings thereof, no more and no less?—and

(3) Is it the burden of the accused to show that he withdrew non-taxable receipts from the partnership of which he was a member?

The whole of the Government's evidence showed a "bulge" computed to be $43,480 in 1949 and $11,453 in 1950 on three assumptions, to wit:

(1) that the petitioner-partner was chargeable only with one-half of the increase or decrease in the non-cash assets of the firm,

(2) that the petitioner-partner did not withdraw from the partnership *more or less* than his share of the current earnings, and

(3) That the partnership had no capital.

The Government's evidence shows that the partnership had gross receipts of over $4,000,000 in 1949 and over $3,800,000 in 1950. Yet the Court of Appeals has approved an assumption that there was no capital involved in this business because the defense did not assume the burden of proving the capital involved.

The evidence shows that the petitioner made every bit of information sought by the Government agents concerning the partnership available to them.

If capital was withdrawn from the partnership and was invested in personal assets, the conviction here represents an unconstitutional attempt to tax capital and is in conflict with *Winkler v. United States* (1956, C. A. 1st), 230 Fed. (2d) 766.

The handling of the partnership interest in this case is in direct conflict with the handling of a similar interest in the Seventh Court case, *United States v. Doyle* (1956, C. A. 7th), 234 Fed. (2d), 788, where, at page 791, it is shown that the taxpayer's full equity in the partnership and the changes therein were taken into account in the computations.

The Court should take into consideration that while taxpayers, their accountants, their attorneys and the courts have only published judicial proceedings to rely upon, the employees of the Internal Revenue Service have a monthly report of the Commissioner of Internal Revenue to guide them which habitually points out what was done by the Government in this type of situation. While these reports are available for inspection at the office of District Directors of Internal Revenue, they are not circulated generally, nor are they available for purchase at the Government Printing Office.

The liberty and property of every taxpaying partner in this country is jeopardized by the result in this case.

II.

The Conviction is Unconstitutional

The defense in this case proceeded on three theories:

(1) The expenditures of the wife cannot be charged to the defendant until it has been shown that they were not made out of her separate income,

(2) There must be proof that any advances from capital and excessive drawings from the partnership did not exceed the deficiency before the Jury could find that there was unreported income, and

(3) The petitioner had done all that a reasonable prudent business man could be expected to do through the use of accountants and bookkeepers in order to file a correct return.

The evidence necessary to support these defenses was produced during the Government's presentation of its case either by cross examination or by direct examination of the Government witnesses.

None of these defenses were submitted to the Jury.

In the sixth of defendant's "requests to charge" appeared the following sentence: "Included in such nontaxable items are gifts, loans, inheritances, sales of capital assets, advances of capital, including excessive drawing from any partnership and exchanges." (P. App. 371a.)

As to such request, the Court ruled:

> "No. 6, the court has the subject covered in a manner that it thinks is correct." (P. App. 376a.)

The Court, in fact, charged as follows (P. App. 392a):

"Income in the net worth method is calculated by taking the difference between the net worth at the beginning of the year and the net worth at the end of the year, and to this sum, if the net worth is greater at the end of the year, is added the nondeductible expenses of the taxpayer. And if no part of it is exempt from taxation, such as loans, gifts or inheritances would be, then it is taxable income and the taxpayer would owe tax on it."

Specific exception to this was taken (P. App. 403a) by defense counsel in the following language:

"The defense excepts to the portion of the charge dealing with the exclusion of loans and gifts and inheritances, and the failure to include withdrawals of capital as nontaxable source of assets."

"Defense excepts to the portion of the charge that the jury can evaluate the effect of error in the net worth statement. It is the position of the defense that if there is error in the net worth computation there must be acquittal."

Defense requested the Court to charge (P. App. 370a):

"5. In the event the jury finds that the excess of increase in net worth over the adjusted gross income reported on the return is from his wife's income, the jury must acquit the defendant unless the prosecution has proven, beyond a reasonable doubt not only that the defendant had knowledge of such income but caused it to be omitted from the return."

The Court ruled (P. App. 376a):

"No. 5 I will not give because I think it is not correctly applicable to the case before the Court."

The Court, in fact, charged (P. App. 395a):

"If she had any income unknown to him and which he could not reasonably ascertain, and her expenses came out of such unknown income, then her expenses should be charged to such income and not be charged as coming out of their joint income."

Exception was duly taken to this charge. (P. App. 403a.)

The Court failed to properly charge the Jury on the effect of the defendant having acted as a reasonably prudent business man.

Defense requested the Court to charge (P. App. 371a):

"8. Where a taxpayer does what any prudent businessman can reasonably be expected to do to file a correct tax return such as having an accountant set up his bookkeeping methods, having bookkeepers and having an accountant make his returns, he can not be found guilty of tax fraud unless there is evidence that he specifically and directly caused an omission from his reported income either by refusing information to such persons or requiring them to record and use erroneous information."

The Court ruled (P. App. 376a):

"No. 8, the Court will not give. The Court considers it to be misleading."

The Court failed to give any charge on the subject.

In *Vloutis v. United States* (1955, C. A. 5th), 219 Fed. (2d) 782 at 794:

"• • • If the evidence discloses circumstances from which honest mistake can be inferred as well as wilful evasion, the charge should be expressed in such a manner as to make clear that the jury is free to determine the question of intent either way in the light of those circumstances."

It has been many times held that the defendant is entitled to have each of his defense theories submitted to the jury. *C. F. Hanson v. United States* (1953, C. A. 5th), 208 Fed. (2d) 914; also *Jenkins v. United States* (1932, C. A. 5th), 59 Fed. (2d) 2 at 3 wherein the Court specifically said:

"• • • Defendants are indeed entitled to have presented to the jury, by appropriate instructions, their defensive theories • • •."

The defense that the petitioner had done everything which a reasonably prudent businessman could have been expected to do has been sustained in, both criminally and civilly, in the following cases:

Lurding v. U. S. (1950, C. A. 6th), 179 Fed. (2d) 419, where a conviction was reversed on the following language:

> "The appellant is an uneducated man, without knowledge of accounting or bookkeeping and unfamiliar with tax problems. His defense was that prior to the investigation he employed Mason, a bookkeeper and tax accountant, on a part-time basis, to make up his tax return. He relied upon Mason for his advice as to his tax liability, and if there was any mistake it was Mason's, for he himself had no intent to violate the law or avoid paying his taxes." 179 Fed. (2d) at 420.

and:

> "• • • where the crux of the offense is the wilfulness of the understatement it is not an immaterial circumstance that the taxpayer did not make out the return, and it becomes immaterial only when the government has established, by direct proof or by circumstances, that the taxpayer knew or perhaps should have known that the return was false." 179 Fed. (2d) at 421.

In *Rhodes v. Edwards* (1956, M. D. Ga.), ___ F. Supp. ___ (Prentice-Hall Fed. Taxes 1956 Par. 72,709), where the taxpayer sought refund of taxes and fraud penalty, in holding that there was no showing of fraud, the Court said:

> "In the latter part of 1940 or the early part of 1941 Mr. Rhodes employed the services of an accountant • • • from a firm of certified public accountants • • •"
> "• • • the books and records that were kept were made available to Mr. Craig for his examination and use and Mr. and Mrs. Rhodes and the bookkeeper • • • would also furnish to Mr. Craig such information as he requested and would assist him as well as they could with • • • the gathering of facts for the tax returns • • •"

In *Hatfried, Inc. v. Commissioner* (1947, C. A. 3rd), 162 Fed. (2d) 628, the Third Circuit Court of Appeals, in discussing penalties where the penalty for failure to file a Personal Holding Company return was involved, pointed out:

> "To accord the status of 'experts' on the tax laws to accountants for representation purposes and then to hold that the taxpayers who entrust to them the task of preparing their tax returns run the risk of paying heavy penalties should they err in the discharge of their assignment creates an absurd situation." 162 Fed. (2d) at 634.

and:

> "To hold that a taxpayer who selects a certified public accountant (to whom as a class the Treasury Department and the Tax Court itself accord recognition as 'experts' and 'counsel') has failed to exercize 'ordinary care and prudence' and becomes liable for the error of his advisors as 'agent' is an inconceivable proposition." 162 Fed. (2d) at 635.

To the same effect are:

Orient Investment & Finance Co. v. Commissioner (1948, C. A.-D. C.), 166 Fed. (2d) 601; and

Haywood Lumber & Milling Co. v. Commissioner (1950, C. A. 2nd), 178 Fed. (2d) 769.

The Tenth Circuit Court of Appeals, in reversing the Tax Court as to a civil fraud penalty in *Davis v. Commissioner* (1950, C. A. 10th), 184 Fed. (2d) 86, used the following pertinent language:

> "* * * They had never attempted to prepare a return and * * * a reputable certified public accountant, had been employed to prepare their returns and they relied entirely upon him to correctly prepare the same and to compute the correct tax * * *" 184 Fed. (2d) at 87.

> "* * * the responsibility of filing a correct return does not necessarily constitute fraud * * *" 184 Fed. (2d) at 87.

"* * * To hold a taxp
actual knowledge tha
disclosure to the exper guilty of fraud, who without
untenable." 184 Fed return is false, and after a full
preparing the same, would be
2d) at 88.

The present case now presents a holding that (a) if a
certified public accounta came into the courtroom and
testified that, in making the defendant's tax return, he,
the accountant, omitted include receipts without the
knowledge of the taxpay and (b) if the accountant was
produced as a governmen witness, the defendant is not en-
titled to have the Jury pa on whether or not the error was
the accountant's instead the taxpayer's.

The cases which have n heard by this Court in the last
few years, the cases pen g in this Court, and the consti-
tutional amendments be proposed within and without
the halls of Congress ha made this Court well aware of
the tremendous attack o he rights of the individual being
waged in the land. Th case represents a terrible step
forward in that attack. t represents a holding that the
burden of proving a de se can only be borne by the pro-
duction of witness and not be based upon the prosecu-
tion evidence. *This me that the burden of proof is now*
on the defendant.

The effect of this cas
long as the Governmen to hold that, constitutionally, so

(a) proves the cost

(b) puts them on some assets,

(c) calls it a net w art, and

the burden of proof ha computation of deficiency,

In *Costello v. Unite* en shifted to the defense.
U. S. 359, this Court sa *tates* (1956), 76 S. Ct. 406, 350
f the Government agents:

"* * * They were allowed to summarize the vast amount of evidence already heard and to introduce computations showing, if correct, that petitioner and his wife received far greater income than they had reported * * *" 76 S. Ct. at 407, 350 U. S. at 360.

The holding has been *overruled herein* because this case holds that the correctness of the computations is wholly immaterial in that defensive theories going to the correctness of the computations are not to be submitted to the Jury unless affirmatively evidenced by witnesses produced by the defense.

What has the Court of Appeals here said about the submission to the Jury of the defensive theories? *Nothing.* What has the Court of Appeals said about the correctness of the computations? *Nothing.* What has the Court of Appeals said of these cases it has failed either to follow or to distinguish? *Nothing.* This case now represents, *without opinion*, a travesty upon constitutional justice. This case now represents, *without opinion*, the strongest possible argument why there can be no constitutional due process in this type of case unless there is an opinion. This case now represents *Dreyfuss* seeking the thunder of a Zola instead of the mealy-mouthed technical wordings of a legal practitioner.

Neither the petitioner nor his counsel have any desire to condone tax evasion or the fraud which is "a contaminating component" of the crime. *C. E. Jordan v. DeGeorge* (1951), 71 S. Ct. 703, 706, 341 U. S. 223, 229. We do say, however, that before a taxpayer can be pronounced guilty of this felony, the Government must carry its burden of proof; the Government must at least prove that the taxpayer realized income which he failed to report and the Jury must be allowed to pass on his defenses. Only this Court can

assure a prompt return to the principles which the Court below would erode without opinion.

CONCLUSION

It is respectfully urged that this petition for a writ of certiorari be granted.

Respectfully submitted,

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